In the
Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-1079

MRS. BETTY POPE,
Petitioner,

versus

CITY OF ATLANTA, WILLIAM A. HEWES,
as Assistant Director of the Bureau of Buildings
of the City of Atlanta, and STATE OF GEORGIA,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF GEORGIA

Moreton Rolleston, Jr.
2604 First National Bank
Tower
Atlanta, Georgia 30303

Attorney for Petitioner

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

Petitioner, Mrs. Betty Pope, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia entered in this case on September 27, 1978.

OPINIONS BELOW

The opinion of the Supreme Court of Georgia (Appendix pp. A 2 - A 10) is reported at 242 Ga. 331. The Southeastern citation is not yet available. The Order entered on October 10, 1978, denying the petitioner's Motion for Rehearing is at Appendix p. A-1.

JURISDICTION

The opinion and judgment of the Supreme Court of Georgia were issued on September 27, 1978. The Order of the

Supreme Court of Georgia denying the Petitioner's Motion for Rehearing was issued October 10, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

QUESTIONS PRESENTED

I. The Georgia Legislature passed an Act that provided as follows:

> A. No land or water use shall be permitted in the flood plain of the Chattahoochee River, the flood plain being the 100 year flood plain as established by the Corps of Engineers. According to the Corps, this area varies in width from 1600 to 3200 feet along the Chattahoochee River from Peachtree Creek in the City of Atlanta to the Buford Dam across the Chattahoochee River, 48 miles up stream.
>
> B. No land or water use shall be permitted within 150 horizontal feet of the banks of the River, if the use interferes with the River.

The Supreme Court of Georgia held in this case that the Act of the Legislature was a proper exercise of police power to protect the water supply of the City of Atlanta. The question is whether or not the Act constituted a proper exercise of police power or did the Act constitute a taking without just and reasonable compensation as required by the Constitution of the State of Georgia.

II. In 1978, the Congress of the United States passed the Chattahoochee National Recreation Area Act (Public Laws 95-344) which provided for the establishment of parks along

this same 48 mile stretch of the Chattahoochee River and which also provided that the Congress would appropriate $78 million to purchase the land needed for the parks. The Congress provided for the payment of land needed for the public purpose. The Georgia Legislature provided that an owner could not use a portion of his land, without paying him, because the land had to be used for public purposes. Who was correct, Congress or the Georgia Legislature?

III. In this case Pope built a tennis court, a small part of which extended into the 100 year flood plain and all of which was located within 150 feet of the bank of the Chattahoochee River. The Georgia Supreme Court held that the tennis court violated the provisions of the River Act. Mrs. Pope contends that the Act constitutes an unlawful taking of her property.

STATUTES INVOLVED

This case involves the Metropolitan River Protection Act, Georgia Laws 1973, p. 128, et seq., as amended by Georgia Laws 1975, p. 837, Section 8, which reads as follows:

> "*Minimum Standards.* Every certificate issued by a governing authority and every recommendation or certificate of the Commission shall comply with the following minimum standards:
>
> (1) No land or water use shall be permitted in the flood plain; and
>
> (2) No land or water use shall be permitted within 150 horizontal feet of the watercourse unless the

> proposed use is not harmful to the water and land resources of the stream corridor, will not significantly impede the natural flow of flood waters, and will not result in significant land erosion, stream bank erosion, siltation or water pollution."

This case also involves Article I, Section I of the Constitution of Georgia of 1976, entitled "Life, Liberty and Property":

> "No person shall be deprived of life, liberty or property, except by due process of law."

The 1945 constitutional provision was codified as Code Section 2-103. Said provision of the Constitution of Georgia of 1976 is codified as Georgia Code 2-101.

STATEMENT OF THE CASE

1.

That gist of this case is that Pope tried to build a tennis court in her back yard within 150 feet of the Chattahoochee River. The work started on February 17, 1976. The work was inspected by the City of Atlanta during the following week and again on March 9th or 10th. Pope, through her attorney, sought the advice of the attorneys for the City of Atlanta and conferred with the City Attorney on many occasions. The City attorney advised Pope's attorney that no building permit was necessary for a tennis court except a permit to build a fence around the tennis court. On March 12th Pope applied for and received the permit from the City of Atlanta to build a fence around this tennis court.

2.

On March 12th, Friends of the River, Inc. sought a temporary restrianing order in the Fulton Superior Court to stop the construction of the tennis court as a violation of the River Act. The TRO was not issued by Judge Alverson on March 12th and was not issued by Judge McKenzie on March 18th after the second hearing. The suit was later dismissed by Friends of the River, Inc.

3.

On March 17th, the City of Atlanta ordered Pope to stop work on the tennis court. Pope asked the City to give reasons for stopping the construction of the tennis court and Pope thereafter met all of the objections which the City relied upon for the stop work order. Pope went back to work on the tennis court and on April 2nd, six weeks after the work had begun and when the work was almost completed, the City of Atlanta threatened to bring charges against Pope unless the work stopped.

4.

The suit then sought a declaratory judgment to determine the constitutionality of the River Act and the Plan.

5.

When the City finally stopped the building of Pope's tennis court, it was 90% completed. It is a regulation size tennis court of 60 x 120 feet. One corner of the court, measuring approximately 14 feet on each side, project into the 100 year

flood plain. The entire court is within 150 feet of the River. The original River Act specified the contour line of the 50 year flood plain; the amended Act substituted the contour line for the 100 year flood plain. However, the Corps of Engineers in the area of Pope's house indicated that the difference in the two flood plains was only about one foot.

6.

The Corps of Engineers in November 1973 prepared a document entitled "Flood Plain Information Chattahoochee River", which was Plaintiff's Exhibit No. 4 in the trial court. This report on page 11 provides as follows:

> "The Intermediate Regional Flood is sometimes referred to as the 100-year flood. This does not mean that a flood of this magnitude will occur every 100 years but that over a long period of time, such as 500 years, it would be equalled, or exceeded, and average of five times. It is conceivable that floods of this magnitude could occur during two consecutive years. Another way of referring to a 100-year flood would be to say that it is a flood which has a one percent chance of occurring during any year. The 50-year flood would be equalled or exceeded an average of 10 times during a 500 year period. There is a 2 percent chance during any year that the 50-year flood could occur."

7.

The record shows that even the building inspector of the City of Atlanta testified that Pope's tennis court did not appreciably affect the Chattahoochee River. But that is not

the issue in this appeal. The real issue is whether the River Protection Act, as drawn, violates the Georgia Constitution.

8.

The Supreme Court of Georgia held that the Georgia Constitution was not violated by the River Protection Act, and the ruling was adverse to the contentions of Pope.

REASONS FOR GRANTING WRIT OF CERTIORARI

1.

The opinion of the Supreme Court of Georgia in this case is contrary to the most important and still leading case on "taking", that is, *Pennsylvania Coal Company vs. H. J. Mahon and Margaret Craig Mahon*, 260 US 393 (1922), where Justice Oliver Wendell Holmes delivered the opinion which held invalid state legislation forbidding the mining of coal in a manner which undercut the surface area on which homes, public buildings and streets had been built. It is interesting to note that the state statute prohibited the mining of coal 150 feet from the next improved property, just like the River Protection Act prohibits any building within 150 feet of the River.

Justice Holmes eloquently, and for all times, put his finger right on the point when he said in the body of the opinion:

> "The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions

upon the 14th Amendment, *Hairston v. Danville & W.R. Co.*, 208 U.S. 598, 605, 52 L.ed. 637, 639, 28 Sup. Ct. Rep. 331, 13 Ann. Cas. 1008. When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.

We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

2.

State laws affecting flood control, wet lands and river basins have been the object of much litigation in the courts of the various states. For example, see the following:

Main v. Johnson
265 A. 2d 711 (1970) (Maine)

Morris County Land Improvement Co. vs. Parsippamy-Troy Hills
193 A2d 232 (1963) (New Jersey)

Dooley v. Town Plan & Zoning Commision
197 A2d 770 (1964) (Conn.)

Bartlett v. Zoning Commission
282 A2d 907 (Conn.)

Arverne Bay Construction Co. v. Thatcher
15 N.E. 2d 587 (New York)

The opinion of the Georgia Supreme Court cited cases to support their opinion which were tried in the states of Washington, Massachusetts, Wisconsin, New Hampshire and Maryland and tried to distinguish the cases cited above. The point we make, of course, is that because of all this litigation and different holdings in different states this Court would do a great service to a lot of people to clarify the law by granting this Writ for Certiorari and by deciding whether or not the standards described by Justice Holmes are still the law of this land and, if not, exactly how far states are permitted to go in the regulation of this type of real estate without constituting an unlawful taking which is prohibited by the Constitutions of most, if not all, state as well as the Constitution of the United States.

3.

In the realm of private property, what could be more important than to establish principles as guide lines to State Legislatures as to what regulations are lawful or what restrictions on property are permitted which pertain to the Hudson River, the Mississippi River, the Colorado River, the Chattahoochee River and all other such large river basins, as well as the so called wet lands of this country. We are aware of the large case load of the Supreme Court of the United States and of the present efforts to relieve the Court of some of this burden. But how else can we draw the attention of the Court to the importance of this subject matter. Suffice it to say that if the River Protection Act in Georgia had been in existence 100 years ago in the entire United States, it would have been impossible to build New York City on the Hudson River, Boston on the Charles River, New Orleans on the Mississippi River and San Francisco on San Francisco Bay.

4.

There is one other reason why this Court should grant this Writ of Certiorari. The River Protection Act so restricts Pope in this case that she can not build anything on part of her land, not even a tennis court. This is an injustice. If this principle is allowed to stand vast areas of private property can be so restricted as to amount to a taking. As the New York case, cited above, held "the only substantial difference between restriction and actual taking, is that the restriction leaves the owner subject to the burden of payment of taxation, while outright confiscation would relieve him of that burden."

Pope's land which fronts on the River extends more than 150 feet back from the River. But the amount of land that Pope owns has no bearing on the legal issue. Suppose Pope owned just land within 150 feet of the River (a 150 foot lot is not uncommon). If Pope owned only 150 feet, then the River Act would take all of her property.

The mere fact that one can boast record title to a physical parcel of land is by itself the least important ingredient; it is the legal effect of such ownership, as reflected in one's ability to use and enjoy such land that give material content to the purely formal fact of ownership.

Since private property is not to be taken at all, except for a public purpose, one might well argue that the more evident the public purpose, the more willing the public ought to be to bear the expense of realizing its interest rather than shifting the burden entirely to a single individual.

5.

We submit that this Court needs no further authority to justify granting the requested writ of certiorari. However, this Court in *Delmar Jockey Club v. Missouri*, 210 U.S. 324, 335 (1908), referred to a state court decision which was assertedly "so plainly arbitrary and contrary to law as to be an act of mere spoliation." This Court in *American Railway Express Co. v. Kentucky*, 273 U.S. 269, 273 (1927), stated,

> "We cannot interfere unless the judgment amounts to mere arbitrary or capiricious exercise of power or is in clear conflict with those fundamental 'principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights.' " (Emphasis added.)

Where a decision of the highest court of a state is plainly arbitrary or manifestly wrong, constitutes gross and obvious error, or ignores "plain rights", such decision can be the basis for a claim of taking without due process. See *Atlantic Coast Line Railroad Co. v. Phillips*, 332 U.S. 168 (1974); *Roberts v. New York*, 295 U.S. 264, 277-278 (1935).

6.

We urge the Court to grant this writ of certiorari.

Respectfully submitted,

Moreton Rolleston, Jr.
Attorney for Petitioner

2604 First National Bank Tower
Atlanta, Georgia 30303
404/ 658-1228

CERTIFICATE OF SERVICE

I, Moreton Rolleston, Jr., attorney for Mrs. Betty Pope, do hereby certify that I have served all of the parties of record with the within and foregoing Petition for Writ of Certiorari to the Supreme Court of Georgia by mailing a copy of same, by certified mail, to all counsel of record, at their correct mailing addresses, with sufficient postage affixed thereto as follows:

Ms. Mary Carole Cooney
2000 Fulton National Bank Building
Atlanta, Georgia 30303

Mr. Isaac Byrd
Assistant Attorney General
132 State Judicial Building
Atlanta, Georgia 30334

Mr. Harvey Koenig
57 Executive Park South, N.E., Suite 310
Atlanta, Georgia 30329

This 4th day of January, 1979.

Moreton Rolleston, Jr.

APPENDIX I

SUPREME COURT OF GEORGIA

Atlanta, October 16, 1978

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

Betty Pope v. City of Atlanta et al.

Upon consideration of the Motion for Rehearing filed in this case, it is ordered that it be hereby denied. All the Justices concur, except Jordan, Bowles, and Marshall, J.J., who dissent.

SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE, Atlanta, December 19, 1978

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

s/ Joline B. Williams, Clerk.

APPENDIX II

IN THE SUPREME COURT OF GEORGIA 168

DECIDED: SEP. 27, 1978

33784 POPE v. CITY OF ATLANTA, ET AL.

HALL, Justice.

This appeal presents a constitutional challenge to the Metropolitan River Protection Act, Ga. Laws 1973, p. 128 et seq., as amended by Ga. Laws 1975, p. 837, and the Chattahoochee Corridor Study, authorized by the River Act and adopted by the City of Atlanta. Atlanta Regional Commission, Chattahoochee Corridor Study (1972).

The Metropolitan River Protection Act ("River Act") permits a planning commission for a metropolitan area with a population of one million or more persons to develop a comprehensive plan for land and water use along stream corridors when a stream supplies 40 percent or more of the water for the metropolitan area. River Act, § 4. A "stream corridor" is all land within 2,000 feet of the watercourse. Sec. 2(e). The planning commission is also authorized to develop plans for the 50-year flood plain of the stream, land which probably will be flooded once every fifty years. Sec. 2(f).

The Chattahoochee River provides most of the water for the City of Atlanta, and the Atlanta Regional Commission (ARC) developed a comprehensive plan for the 48 mile long stream corridor from Buford Dam to Peachtree Creek. The

Commission divided the stream corridor into 23 sections, each of which was analyzed and mapped according to six factors to determine which land was vulnerable to damage by development and which land was suitable for development. Those factors were geology, hydrology, soils, vegetation, slope and aspect. ARC also ranked proposed land uses from recreational use through thirteen housing types to commercial and industrial developments according to the effect of the land use on the land. When the land vulnerability study and the study on effects of development were combined, the result was a development plan which allocated land uses by matching types of development with land best suited for the development.

Even though ARC developed the Corridor Study, the Commission has no enforcement powers. After a political subdivision adopts the Corridor Study, land or water use inconsistent with the Study is forbidden. A use is deemed inconsistent until the political subdivision issues a certificate of compliance for any clearing, construction, excavation or filling in the stream corridor. After issuance of the certificate, ARC reviews the certificate and may recommend modification if it finds that the proposed use is inconsistent with the Corridor Study. The political subdivision may accept the Commission's recommendation, override it or request reconsideration of the proposed use. River Act, § §5, 6.

Minimum standards for the certificate with respect to the subject river's fifty-year flood plain and the area within 150 feet of the watercourse are specified in the Act. Uses within these overlapping areas are restricted to those uses "not harmful to the water and land resources of the stream corridor . . . [which do not] significantly impede the natural flow

of flood waters, and [which] will not result in significant land erosion, stream bank erosion, siltation or water pollution."[1] River Act, §8. Agricultural and animal husbandry uses as well as ordinary maintenance and landscaping are exempt from the Act's restrictions. River Act, § 12.

ARC has developed further standards for the flood plain and the area within 150 feet of the watercourse. Grading and vegetation clearance permits are required; cut and fill operations which would alter the natural flow of flood water are not permitted. Only twenty percent of the flood plain may be covered by an impervious structure. Corridor Study, pp. 54-55.

Appellant Pope owns a 3.7 acre tract of land bordering on the Chattahoochee River, which contains a house, driveway, man-made lake and swimming pool. Pope began construction of a tennis court within the stream corridor without a certificate of compliance from the City of Atlanta. The City issued a stop-work order because the tennis court was an impervious structure partially within the flood plain and within 150 feet of the River. The tennis court also required filling and the construction of a retaining wall.

After issuance of the stop-work order, appellant sought a declaratory judgment from federal district court that the River Act was unconstitutional, but the federal court upheld

1. We read the River Act to apply identical provisions to the flood plain and to the area within 150 feet of the watercourse since these areas overlap. This is ARC's interpretation of its enabling act, and this interpretation is given great weight. *Undercofler v. Eastern Air Lines, Inc.*, 221 Ga. 824 (147 SE2d 436) (1966).

the statute. Pope v. City of Atlanta, 318 FSupp. 665 (N.D. Ga. 1976), aff'd mem., 575 F2d 298 (5th Cir. 1978). Appellant then pressed her claim in the Superior Court of Fulton County. On cross appeals from the first decision of the superior court, this court held that Pope's state constitutional claims were not barred by the res judicata effect of the federal suit and that the River Act was not an unconstitutional attempt by the Georgia legislature to exercise local zoning power. *Pope v. City of Atlanta*, 240 Ga. 177 (240 SE2d 241) (1977). On remand, Pope asserted that because the River Act and Corridor Study prevented the construction on her property of a tennis court, the River Act and Corridor Study unconstitutionally appropriate private property for public use without compensation. The trial court upheld the constitutionality of the statute and the Corridor Study. We affirm.

The inherent police power of the state extends to the protection of the lives, health and property of the citizen, and to the preservation of good order and public morals and is not subject to any definite limitations, but is coextensive with the necessities of the case and the safeguard of public interest. *McCoy v. Sanders*, 113 Ga.App. 565 (148 SE2d 902) (1966). Further, in the area of environmental legislation, the State Constitution specifically authorizes the General Assembly "to provide for restrictions upon land use in order to protect and preserve the natural resources, environment and vital areas of this State." Ga. Code Ann.§ 2-1404. Appellant contends that the City's failure to permit her to construct a tennis court is, per se, a taking of property like eminent domain. This position misconceives the law.

The distinction between use of eminent domain and use of

the police power is that the former involves the taking of property because it is needed for public use while the latter involves the regulation of the property to prevent its use in a manner detrimental to the public interest. 1 Nichols' The Law of Eminent Domain § 1.42 (3d ed. 1976). Many regulations restrict the use of property, diminsh its value or cut off certain property rights, but no compensation for the property owner is required. Among the valid regulations of property are abatement of nuisances, *Davis v. Stark*, 198 Ga. 223 (31 SE2d 592) (1944); *Mack v. Westbrook*, 148 Ga. 690 (98 SE 339) (1919); zoning, *Barrett v. Hamby*, 235 Ga. 262 (219 SE2d 399) (1975); health regulations, *Vinson v. Home Builders Ass'n of Atlanta*, 233 Ga. 948 (213 SE2d 890) (1975); and building standards, *Reed v. White*, 207 Ga. 623 (63 SE2d 597) (1951). This court tests regulation of property to determine that the government has not exceeded its police power, for excessive regulation of property violates the due process clause, Ga. Code Ann. § 2-101, and the prohibition against taking property for public use without compensation. Ga. Code Ann. §2-301. In *Vinson v. Home Builders Ass'n of Atlanta*, supra, this court stated that that exercise of the police power was subject to the limitation that the ordinance bear some "reasonable relation" to the public health. In *Barrett v. Hamby*, supra, this reasonableness standard was further articulate as the requirement that a zoning classification "may only be justified if it bears a substantial relation to the public health, safety, morality or general welfare." 235 Ga. at 265 (219 SE2d 402). This approach essentially balances the state's interest in regulation against the landowner's interest in the unfettered use of his property. We adopt a balancing test for the type of police power restriction on property involved in this case.[2] Several other states

2. The type of land use restriction involved in this case is unlike zoning; therefore the factors suggested in *Guhl et al v. Holcomb Bridge Road Corp.*, 238 Ga. 322 (232 SE2d 830) (1977) for testing the reasonableness of zoning ordinances are inapplicable here.

also measure land use restrictions with a balancing test. E.g., Maple Leaf Investors, Inc. v. Washington Dept. of Ecology, 88 Wash. 2d 726 (565 P2d 1162)(1977); Turnpike Realty Co. v. Town of Dedham, Mass. (284 NE2d 891) (1972), cert. den., 409 US 1108 (93 SC 908, 34 LEd2d 689) (1973).

The interests advanced by the City of Atlanta for these restrictions on appellant's property relate to the public health and safety. Sediment is a major pollutant in the Chattahoochee River. Soil erosion not only damages the land, but the soil carried into the River increases the cost of water treatment and reduces channel capacity, resulting in an increased risk of flooding. Corridor Study, p. 54. Clearing vegetation and grading or cut and fill operations which alter the natural elevation or slope of the land may increase surface water run-off and soil erosion. Further, the construction of impervious structures in the flood plain or within 150 feet of the watercourse means that rain water can not be absorbed by the earth. Surface water run-off, soil erosion and the risk of flooding are thus increased. Corridor Study, p. 55. Requiring permits for grading and vegetation clearance, prohibiting cut and fill operations which alter the natural elevation and limiting the construction of impervious structures are reasonable means of guarding against the dangers of soil erosion, sedimentation and increased flooding. River Act, § 4.

When the state's interests in preventing flooding, halting land erosion and protecting the water supply are weighed against appellant's interest in constructing her tennis court within 150 feet of the River, the state's interests weigh heavier in the balance. The dangers which flow from overintensive stream corridor development may render some

property unsuitable for development, and the state is entitled to recognize this fact. Although one tennis court might affect the River only slightly, the state is justified in considering the cumulative effect of development when it makes land use plans. Thus, the City of Atlanta and the state have engaged in valid land use regulation and have not appropriated appellant's land for public use without compensation.

The experience of other state courts in reviewing land use development plans buttresses our consludion in this case. In a case quite similar to our own the Supreme Court of Washingron upheld the refusal to grant building permits for single family homes in the Cedar River Flood plain, even though seventy percent of the appellant's land was in the flood plain. Maple Leaf Investors, Inc. v. Washington Dept. of Ecology, 88 Wash. 2d 726 (565 P2d 1162) (1977). The Massachusetts supreme court upheld flood plain restrictions in Turnpike Realty Co. v. Town of Dedham, supra, Mass. (284 NE2d 891). In that case, the court held that land had not been unconstitutionally taken even though its uses were restricted to woodland, wetland, grassland or recreational use which did not require filling because of the necessity of flood plain zoning to reduce damage to life and property.

The Wisconsin supreme court, using a different rationale, reached a similar result in Just v. Marinette County, 56 Wis. 2d 7 (201 NW2d 761) (1972). The court upheld restrictions on land use within 1000 feet of lakes or within 300 feet of navigable streams on the ground that the landowner had no right to use his land to the detriment of the public. This approach was also followed in Sibson v. State, 115 N.H. 124 (336 A2d 239) (1975), upholding a tidal wetlands act. Similarly, Maryland's supreme court, through analogy to public

nuisance law, upheld a coastal land use act and the denial of dredging permit, reasoning that regulation or restraint of a use of land that would be injurious to the rights of the public is a valid exercise of the police power. Potomac Sand & Gravel Co. v. Gov. of Maryland, 266 MD 358 (293 A2d 241) (1972), cert. den., 409 US 1040 (93 SC 525, 34 LE2d 490).

Appellant has cited several cases in which land use development plans were held unconstitutional. One of these, Morriss County Land Improvement Co. v. Parsippany-Troy Hills, 40 N.J. 539 (193 A2d 232) (1963), is easily distinguishable. In that case, zoning of petitioner's land for agricultural purposes was held unconstitutional as a ploy to keep the land in its natural state and its price depressed until the state or national government could condemn it for a flood control project. Further, the court noted that a zoning ordinance was involved, not land use restrictions enacted pursuant to the exercise of other police powers. *Id.*, 40 N.J. (193 A2d 236 Fn.1). Our case also does not involve zoning but land use restrictions necessary for the public health and safety which presumably would be valid in New Jersey as well. See Fred v. Borough of Old Tappan, 10 N.J. 515 (92 A2d 593)(1963).

Although Dooley v. Town Plan and Zoning Com'n, 151 Conn. 304 (197 A2d 770) (1964), invalidated land use zoning as applied to Dooley's land, the case is read narrowly by its court which upheld the denial of a permit to fill tidal wetlands in Brecciaroli v. Conn. Com'r of Env. Protection, 168 Conn. 349 (362 A2d 948) (1975).

Appellant also relies heavily upon Justice Holmes' opinion in Pennsylvania Coal Co. v. Mahon, 260 US 393 (43 SC 158, 67 LEd 322) (1922). The essence of that opinion is that the

state ran afoul of the Constitution by denying to the mining company the entire value of its rights in the land. The mining company sold the surface rights in the property but retained the right to mine coal without liability for damage caused by the mining. The Pennsylvania legislature then forbade mining that would endanger surface support for streets or homes. Since coal mining causes subsidence, the coal company would be unable both to mine and to comply with the legislation. The Supreme Court held that a "taking" had occurred because the legislature had, in essence, stripped the company of all its rights - the contract right to mine and the property right to subsurface minerals. Pope cannot fit herself within the rationale of *Mahon* because the River Act and Corridor Study only regulate her use of her property and do not deprive her of all her rights in the property.

A similar objection can be made to appellant's reliance on Pumpelly v. Green Bay Co., 80 US 166 (20 LEd 557) (1871). The government permanently flooded Pumpelly's land when it dammed a river for flood control. The Supreme Court found that all reasonable use of Pumpelly's land was taken by the flooding. Pope may use her land within the exceptions of Section 12 of the River Act or when she demonstrates that her use will not "result in significant land erosion, stream bank erosion, siltation or water pollution." River Act, §8.

We therefore find that the River Act and Corridor Study do not violate the Constitution of Georgia.

Judgment affirmed. All the Justices concur, except Jordan, Bowles, and Marshall, J.J., who dissent.

APPENDIX III

IN THE
SUPREME COURT OF STATE OF GEORGIA

MRS. BETTY POPE, NUMBER 33784
Appellant

VS.

CITY OF ATLANTA, WILLIAM A. HEWES, as Assistant Director of the Bureau of Buildings of the City of Atlanta,
Appellees,

STATE OF GEORGIA,
Intervenor-Appellees.

MOTION FOR RE-HEARING

Now comes the Appellant, Mrs. Betty Pope, and files this Motion for Re-Hearing within ten days of the judgment of this Court, dated September 27, 1978. In support of her Motion Appellant shows as follows:

1.

We respectfully submit that this Court has misconstrued *Pennsylvania Coal Company vs. H.J. Mahon and Margaret Craig Mahon*, 260 U.S. 393. The section of the River Act which prohibits Pope from using the 150 strip of land along the Chattahoochee River effectively prevents Pope from us-

ing said land except to walk upon it. The area is 150 x 425, or 63,750 square feet or about one and one-half acres. It is immaterial whether Pope owns any adjoining land or two acres of adjoining land or 200 acres of adjoining land. The River Act prevents Pope from using the one and one-half acres along the River and thus is a complete taking and a complete denial of the use of a large tract of valuable land.

If we have come to the point in this country where something is so simply because a Legislature says so or because an appointed Commission says so, then we are dangerously close to the possibility of losing our freedom, because from time to time the Legislature can deprive individuals of other rights on the declared theory that the public good outweighs the individual rights. It is true that this country is on its way to total socialism and autocratic government; only the judicial system of the United States can save this country. This case is just another small example that the accumulative effect of a lot of these cases will cause our constitutional government to crumble.

We respectfully urge the Court to reconsider its ruling, especially in the light of the three desents.

2.

The opinion of this Court, on page 4, stated that "Pope began construction on a tennis court within the stream corridor without a certificate of compliance from the City of Atlanta. This may be an inaccurate statement. It is true that Pope started preparations by removing trees without a building permit. But the record shows that the City of Atlanta did issue a building permit and that construction proceeded until

the tennis court was approximately ninety percent complete before construction was stopped. Two judges of the Fulton Superior Court declined to issue a temporary injunction. Judge Weltner issued a temporary injunction and then lifted the injunction after the City failed to amend its laws as directed by Judge Weltner. The point we make is that Pope did not blantantly violate the law; on the contrary, the City Attorney agreed that Pope needed no building permit and the work proceeded finally with a building permit and without objections from the Court. This factual matter has no bearing on the question of constitutionality. It might have a bearing on whether or not the Act was constitutionally applied.

We, therefore, urge the Court to revise its opinion and hold the Legislation to be unconstitutional.

Respectfully submitted,

s/ Moreton Rolleston, Jr.
MORETON ROLLESTON, JR.
Attorney for Appellant

2604 First National Bank Tower
Atlanta, Georgia 30303
658-1228

CERTIFICATE OF COUNSEL

This is to certify that Moreton Rolleston, Jr., attorney for the appellant, upon careful examination of the opinion of the Court, believes that the facts and legal theories were either overlooked or misconstrued and that the opinion of the

Court should be amended to hold the River Act to be unconstitutional.

s/ Moreton Rolleston, Jr.
Moreton Rolleston, Jr.

CERTIFICATE OF SERVICE

I, Moreton Rolleston, Jr., attorney for Mrs. Betty Pope, do hereby certify that I have served all of the parties of record with the within and foregoing Motion for Rehearing by mailing a copy of same, by certified mail, to all counsel of record, at their correct mailing addresses, with sufficient postage affixed thereto as follows:

Ms. Mary Carole Cooney
2000 Fulton National Bank Bldg.
Atlanta, Georgia 30303

Mr. Isaac Byrd
Assistant Attorney General
132 State judicial Building
Atlanta, Georgia 30334

Mr. Harvey Koenig
57 Executive Park South, N.E.
Atlanta, Georgia 30329

This 3rd day of October, 1978.

s/ Moreton Rolleston, Jr.
Moreton Rolleston, Jr.